RECORD AND BRIEFS

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In The

Supreme Court of the United States

MICHAEL NELSON CURRIER,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Double Jeopardy Clause's issue-preclusion component may preclude a future criminal trial when a defendant is acquitted by a jury in an earlier trial and the defendant carries his burden of showing that the jury necessarily determined an issue of ultimate fact that would need to be proven by the prosecution at the second trial. The issues presented are:

1) Whether the defendant has carried his burden of showing that the jury that acquitted him of breaking and entering and grand larceny necessarily found that he never possessed the guns that were stolen.

2) Whether a defendant who agrees to the severance of multiple charges for his benefit waives the issue-preclusion protection of the Double Jeopardy Clause.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	5
I. This case is a poor vehicle because resolution of Currier's question presented will not afford him meaningful relief	7
II. There is no significant split of authorities on the waiver question presented	12
A. The Double Jeopardy Clause contains a limited issue-preclusion component	13
B. Although several courts have reached different conclusions about when the issue-preclusion protection is waived, the issue would benefit from further percolation	18
III. The Supreme Court of Virginia correctly concluded that the Double Jeopardy Clause was not implicated when the firearm charge was severed for Currier's benefit and with his consent	25
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES

Am. Foreign Serv. Ass'n v. Garfinkel,
490 U.S. 143 (1989) 12

Arizona v. Evans,
514 U.S. 1 (1995) 24

Ashe v. Swenson,
397 U.S. 436 (1970) 5, 8, 15, 16

Bravo-Fernandez v. United States,
137 S. Ct. 352 (2016) 7, 14, 15, 17, 18

Commonwealth v. States,
938 A.2d 1016 (Pa. 2007) 22

Crist v. Bretz,
437 U.S. 28 (1978) 13

Dowling v. United States,
493 U.S. 342 (1990) 7, 10

Gragg v. State,
429 So. 2d 1204 (Fla. 1983) 22, 23

Green v. United States,
355 U.S. 184 (1957) 13, 15

Jeffers v. United States,
432 U.S. 137 (1977) ..... *passim*

Joya v. United States,
53 A.3d 309 (D.C. 2012) 21, 22

Lee v. United States,
668 A.2d 822 (D.C. 1995) 22

Marcus v. Search Warrant of Prop.,
367 U.S. 717 (1961) 12

TABLE OF AUTHORITIES—Continued

Page

McGautha v. California,
402 U.S. 183 (1971) 26

Ohio v. Johnson,
467 U.S. 493 (1984) 13, 17, 18, 19, 27, 28

Old Chief v. United States,
519 U.S. 172 (1997) 23

Oregon v. Hass,
420 U.S. 714 (1975) 23

PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (1980) 23

Schiro v. Farley,
510 U.S. 222 (1994) 7, 8, 10

Spears v. United States,
555 U.S. 261 (2009) 24, 25

Standefer v. United States,
447 U.S. 10 (1980) 14, 16

State v. Blache,
480 So. 2d 304 (La. 1985) 21

State v. Butler,
505 N.W.2d 806 (Iowa 1993) 23, 24

State v. Chenique-Puey,
678 A.2d 694 (N.J. 1996) 19, 20

State v. Vazquez,
419 So. 2d 1088 (Fla. 1982) 23

Umana v. Swidler & Berlin, Chartered,
669 A.2d 717 (D.C. 1995) 22

TABLE OF AUTHORITIES—Continued

Page

United States v. Aguilar-Aranceta,
957 F.2d 18 (1st Cir. 1992),
abrogated in part by Yeager v. United States,
557 U.S. 110 (2009) 21

United States v. Ashley Transfer & Storage Co.,
858 F.2d 221 (4th Cir. 1988) 18, 19

United States v. Blyden,
930 F.2d 323 (3d Cir. 1991) 18, 19, 26

United States v. Jorn,
400 U.S. 470 (1971) 14, 15, 25, 28

United States v. Nat'l Treasury Emps. Union,
513 U.S. 454 (1995) 12

United States v. Powell,
469 U.S. 57 (1984) 17

Wade v. Hunter,
336 U.S. 684 (1949) 13

Yeager v. United States,
557 U.S. 110 (2009) 5, 7, 17

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V, cl. 2 ..... *passim*

RULES OF COURT

Sup. Ct. R. 10(b) 20

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL NELSON CURRIER, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. On March 7, 2012, Michael Currier and Bradley Wood broke into the home of Paul and Brenda Garrison and stole a safe containing approximately $70,000, more than 20 guns, and various personal papers.[1] Although the money was missing, the safe was found with the guns and papers on the bottom of a local river.[2]

Soon after the crime was committed, Wood, the Garrisons' nephew, was identified as a suspect.[3] Wood confessed to the theft in exchange for a plea agreement

[1] Pet. App. 3a; *see also* Va. Ct. App. Jt. App. 68-70, 215, 351-53 [hereinafter "Jt. App."].

[2] *See* Pet. App. 3a.

[3] *See id.*; *see also* Jt. App. 87-91, 106.

and proceeded to inculpate multiple persons.[4] Currier was identified by Wood as an accomplice.[5]

Based on Wood's statements, detectives included Currier's picture in a photo array, which was shown to a neighbor who was at home when the Garrisons' home was broken into.[6] The neighbor testified at trial that "she had noticed a lot of 'loud banging' and 'loud noises' coming from the Garrison residence across the street."[7] She saw "an older model white pickup truck with an orange stripe" drive away from the house.[8] She was uncertain of whether there were two or three individuals in the truck, and she could not identify the driver.[9] But she identified Currier "as the passenger" after seeing his photo in the lineup.[10] A cigarette butt recovered from the truck also contained Currier's DNA.[11]

Currier was indicted by a single grand jury for breaking and entering, grand larceny, and possession of a firearm by a convicted felon.[12] "Prior to trial, the

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[4] *See* Pet. App. 3a; *see also* Jt. App. 197, 215-16, 237.

[5] Pet. App. 3a-4a; Jt. App. 200.

[6] Pet. App. 3a.

[7] *Id.*

[8] *Id.*

[9] *Id.*; *see also* Jt. App. 250-51.

[10] Pet. App. 3a.

[11] Pet. App. 4a.

[12] *Id.*; *see also* Jt. App. 7-9.

defense and the prosecution agreed to sever the firearm charge from the grand larceny and the breaking and entering charges."[13]

The trial was held in October 2013 on the breaking-and-entering and grand-larceny charges.[14] Currier presented no evidence in defense; instead he argued that the testimony of the Commonwealth's witnesses was inconsistent and unreliable.[15] The jury acquitted Currier on both counts.[16]

Before the second trial, Currier moved to dismiss the firearm charge.[17] His motion was denied, and the trial was held in March 2014. Although the same witnesses testified, the evidence presented to the jury was different given the significant differences in what the Commonwealth had to prove with respect to the firearm charge. Evidence was introduced that Currier was a felon who had been previously convicted of breaking and entering.[18] Moreover, Wood testified about what happened at the river after the safe had been stolen; his testimony at the first trial had generally focused on

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[13] Pet. App. 4a; *see also* Jt. App. 598-99 ("By agreement between the Commonwealth and Mr. Currier, the circuit court severed Mr. Currier's charges. . . .").

[14] *See generally* Jt. App. 32-284 (partial transcripts, jury instructions, and verdict form from the first trial).

[15] *See generally* Jt. App. 240-53 (Currier's closing argument).

[16] Jt. App. 284.

[17] Jt. App. 261, 302.

[18] Jt. App. 480-82.

the events preceding and during the breaking and entering.[19] At trial, Wood testified that Currier was the one who had taken the guns out of the safe and laid them on the bed of the truck.[20] Then, after the money had been removed from the safe, Currier put the guns back inside the safe and the safe was dumped into the river from the bed of the truck.[21]

The jury found Currier guilty of being a felon in possession of a firearm.[22] And the trial court sentenced him to five years' incarceration.[23]

2. Currier appealed his conviction to the Court of Appeals of Virginia, arguing that the issue-preclusion component of the Double Jeopardy Clause barred his trial on the firearm charge.[24] But the Court of Appeals affirmed the trial court's judgment.[25] Without addressing the Commonwealth's argument that Currier could not show that an issue of ultimate fact was necessarily decided in his favor at the earlier trial,[26] the Court of Appeals concluded that the Double Jeopardy Clause did not apply when multiple charges are severed with

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[19] *Compare* Jt. App. 201-02, *with* Jt. App. 417-19.

[20] Pet. App. 4a; Jt. App. 417-19.

[21] Pet. App. 4a; Jt. App. 418-19.

[22] Jt. App. 532.

[23] Pet. App. 5a.

[24] Currier also challenged whether the trial court abused its discretion at the second trial by admitting certain evidence because that evidence was unduly prejudicial. *See* Pet. App. 11a-13a; *see also* Jt. App. 615-17.

[25] Pet. App. 2a.

[26] Pet. App. 10a n.1.

the defendant's consent and for his benefit.[27] The Court of Appeals explained that "the concern that lies at the core of the Double Jeopardy Clause"—"the avoidance of prosecutorial oppression and overreaching through successive trials"—is not present when the defendant consents to severance to avoid any prejudice that may result from trying certain charges together.[28] The Court of Appeals declined to extend *Ashe v. Swenson*[29] and *Yeager v. United States*[30] to hold that the Double Jeopardy Clause's issue-preclusion component bars an agreed trial in a case like this one.[31]

Currier appealed to the Supreme Court of Virginia, which granted his petition but affirmed for the reasons given by the Court of Appeals.[32] Currier filed a timely petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

Currier asserts that courts "are openly and intractably divided" over the issue he contends is presented in this case: whether the issue-preclusion component of the Double Jeopardy Clause is waived when a defendant agrees to sever multiple charges for his own

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[27] *See* Pet. App. 5a-6a.

[28] *Id.*; *see also* Pet. App. 9a-10a.

[29] 397 U.S. 436 (1970).

[30] 557 U.S. 110 (2009).

[31] *See* Pet. App. 7a-10a.

[32] Pet. App. 1a.

benefit.[33] But there is no entrenched split of authority on that question warranting this Court's intervention. And even if he were right, this case is a poor vehicle to address the nascent circuit split.

At every appellate level, the Commonwealth has argued that Currier is not entitled to relief regardless of whether he waived the issue-preclusion protection because he has not demonstrated that an issue of ultimate fact was resolved in his favor at the first trial that would bar his second trial. Courts frequently address the "issue of ultimate fact" question first, perhaps recognizing that there is no need to opine on a novel constitutional question if the Double Jeopardy Clause is not implicated at all. Because the Virginia appellate courts declined to address the "issue of ultimate fact" question, no court has resolved it either way in this case. So if certiorari were granted, this Court would need to decide that question in the first instance both as a prudential matter and to award Currier meaningful relief.

Moreover, the Supreme Court of Virginia's decision is correct on the merits. The Double Jeopardy Clause is not meant to serve as a sword for opportunistic defendants to wield against the government. Currier agreed to sever the firearm charge to avoid the prejudice that could result if evidence of his status as a felon was entered into evidence at his trial on the breaking-and-entering and grand-larceny charges. He enjoyed the benefit of that severance; no evidence was

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[33] Pet. 2.

admitted that identified Currier as a felon, and the jury heard no testimony about any prior convictions. Having obtained an acquittal in the breaking-and-entering and grand-larceny trial, Currier wants to use the severance that benefited him to deny the Commonwealth its right to try him on the firearm charge. The Double Jeopardy Clause does not compel that inequitable result.

I. This case is a poor vehicle because resolution of Currier's question presented will not afford him meaningful relief.

As explained below, Currier is wrong that there is a split of authority on the question presented warranting this Court's review. But even if he were right, this case would be a particularly poor vehicle for addressing the issue. As many of this Court's decisions show, it is the rare case where defendants can carry their "burden of demonstrating that the jury necessarily resolved in their favor" "an issue of ultimate fact" that would bar a future prosecution.[34] The Commonwealth has consistently argued in this case that Currier failed to carry his burden of showing that the jury that acquitted him of breaking-and-entering and grand-larceny necessarily found that he had never possessed

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[34] *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 356, 363 (2016); *see also Yeager*, 557 U.S. at 125-26; *Schiro v. Farley*, 510 U.S. 222, 232-33 (1994); *Dowling v. United States*, 493 U.S. 342, 352 (1990).

the firearms that were stolen from the Garrisons.[35] No court has resolved that issue, and thus, there is a likelihood that this Court's resolution of the waiver question will not result in meaningful relief.[36]

Ashe instructs that "realism and rationality" are the guides for determining what was necessarily decided in a prior criminal proceeding, and

> [w]here a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[37]

If "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose," then the issue-preclusion component of the Double Jeopardy Clause does not apply.

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[35] *See generally* Br. of Commonwealth, *Currier v. Commonwealth*, No. 160102 (Va. Aug. 12, 2016); Br. of Commonwealth, *Currier v. Commonwealth*, No. 1428-14-2 (Va. Ct. App. May 29, 2015).

[36] *See Schiro*, 510 U.S. at 232 (declining to address whether issue preclusion would bar the use of certain evidence because "Schiro has not met his burden of establishing the factual predicate for the application of the doctrine, if it were applicable, namely, that an 'issue of ultimate fact has one been determined' in his favor").

[37] *Ashe*, 397 U.S. at 444 (citation omitted).

Here, Currier was indicted by a single grand jury for three crimes: breaking and entering; grand larceny; and being a felon in possession of a firearm.[38] The first trial was on the breaking-and-entering and grand-larceny charges, while the second trial was on the firearm charge. Although Currier claims now that the first trial focused on a single fact—whether he was a participant in the crime[39]—he never conceded that that was the sole fact at issue during the trial. He presented no affirmative case, and his closing argument to the jury makes clear that he did not see this as a case of mistaken identity; his argument plainly was that the testimony of the Commonwealth's witnesses was so inconsistent that there was no way to know what happened the day the Garrisons' home was broken into and the safe stolen.[40]

For example, Currier's closing argument highlighted the testimony of the Garrisons' neighbor, and her inability to "tell [the jury] how many people are actually in the truck, two or three."[41] After recounting her inconsistent testimony, Currier argued that, "[w]e really can't tell what happened, you know, how many people were in the truck. She doesn't know if the driver was a man or a woman and she can remember nothing about the driver. . . ."[42]

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[38] Jt. App. 7-9.

[39] *See, e.g.*, Pet. 5.

[40] *See generally* Jt. App. 240-53.

[41] Jt. App. 250.

[42] Jt. App. 250-51.

With respect to Wood's testimony, Currier did not admit that Wood must have had an accomplice and argue that it just was not him; instead, Currier argued that Wood was entirely unbelievable as a witness and that no one could know what had happened that day. In a series of rhetorical questions, Currier asked: "[W]hat do we believe about [Wood] based on everything else? What do we not believe? What's the story? But I submit [that] you can't figure out what it is. You can't try and figure it out. We have absolutely no case that you can put a man who is presumed to be innocent in jail[.]"[43]

Currier's decision to argue his case to the jury based on the inconsistency of the Commonwealth's evidence in general—as opposed to arguing specifically that it was not Currier in the truck—makes it impossible to determine the basis for the jury's verdict.[44] Given the inconsistent testimony about whether there were two or three individuals in the truck, the jury could rationally have decided to acquit Currier because the Commonwealth had not proven beyond a reasonable doubt that Currier had entered the house.[45] The jury

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[43] Jt. App. 252-53.

[44] *E.g.*, *Dowling*, 493 U.S. at 352 (declining to find issue preclusion where "[t]here are any number of possible explanations for the jury's acquittal verdict at Dowling's first trial"); *Schiro*, 510 U.S. at 232-33 (similar).

[45] Jt. App. 276-82.

instructions would support such a conclusion even if the jury believed Currier was in the truck.[46]

Moreover, the elements for being a felon in possession of a firearm are significantly different from breaking and entering and grand larceny.[47] To find Currier guilty of the firearm charge, the jury needed to find only two facts: (1) Currier was a felon; and (2) he possessed a gun.[48] Evidence was admitted at the firearm trial on both elements that was not introduced in the breaking and entering and grand larceny trial because it was not relevant. First, the Commonwealth introduced Currier's prior sentencing order to establish that he was a felon.[49] Second, Wood testified that Currier handled every gun in the safe when it was opened at the river.[50] That evidence alone was sufficient to convict Currier on the firearm charge. Regardless of whether he stole the guns, Currier violated the law when he temporarily possessed them.

Thus, to reach the question presented here and be certain that the decision would afford Currier meaningful relief, this Court must resolve in the first instance whether an issue of ultimate fact was necessarily determined at Currier's first trial that would bar

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[46] *See* Jt. App. 267; *see also* Jt. App. 262 ("[A]fter you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.").

[47] *Compare* Jt. App. 276, 281, *with* Jt. App. 530-31.

[48] Jt. App. 531.

[49] Jt. App. 480-82.

[50] Jt. App. 417-19.

his second trial. The alternative would be to decide a significant constitutional question about waiver and the Double Jeopardy Clause with little guarantee that it would be of practical significance to Currier. In numerous cases, this Court has admonished that "courts should be extremely careful not to issue unnecessary constitutional rulings."[51] Because Currier has not carried his burden of showing that the issue-preclusion protection would apply in this case, the Court should avoid addressing the novel waiver issue.

II. There is no significant split of authorities on the waiver question presented.

Even if this Court were willing to overlook the vehicle problem, Currier is wrong that there is an entrenched circuit split on the waiver issue.[52] To understand why, it is helpful to place this case in context with this Court's Double Jeopardy Clause jurisprudence. The Supreme Court of Virginia's decision fits comfortably within this Court's precedent and the holdings of other courts that have considered the issue.

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[51] *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 143, 161 (1989); *see also United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) ("Our policy of avoiding unnecessary adjudication of constitutional issues therefore counsels against determining senior officials' rights in this case.") (citation omitted); *Marcus v. Search Warrant of Prop.*, 367 U.S. 717, 723 n.9 (1961) ("Because of the result which we reach, it is unnecessary to decide other constitutional questions raised by appellants. . . .").

[52] *See* Pet. 8.

A. The Double Jeopardy Clause contains a limited issue-preclusion component.

The Double Jeopardy Clause of the Fifth Amendment states that: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."[53]

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[54]

This Court has recognized two concerns of the Double Jeopardy Clause: "prosecutorial overreaching" and "finality."[55]

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[53] *Green v. United States*, 355 U.S. 184, 187 (1957).

[54] *Id.* at 187-88.

[55] *Ohio v. Johnson*, 467 U.S. 493, 501 (1984); *see also Crist v. Bretz*, 437 U.S. 28, 33 (1978); *Wade v. Hunter*, 336 U.S. 684, 689 (1949) ("double-jeopardy prohibition is aimed" at "oppressive practices").

Despite the importance of the double-jeopardy prohibition, the Government's inability to appeal acquittals "calls for guarded application of preclusion doctrine in criminal cases."[56] Consequently, the precise facts and circumstances in particular cases are critical to determining if a prosecution is barred by the Double Jeopardy Clause. And whether the defendant consented to the actions that caused the double-jeopardy problem has always been identified as a dispositive fact in the inquiry.

For example, in *United States v. Jorn*, this Court stated that a defendant waives his double-jeopardy protections and could be re-prosecuted for the same offense if he moves for a mistrial, "even if the defendant's motion is necessitated by prosecutorial or judicial error."[57] Although the Court acknowledged the "constitutional policy of finality for the defendant's benefit in federal criminal proceedings," the Court found that that interest dissipates when the defendant consents to the mistrial.[58] And in *Jeffers v. United States*, this Court explained that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the

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[56] *Bravo-Fernandez*, 137 S. Ct. at 358 (citing *Standefer v. United States*, 447 U.S. 10, 22-23 & n.18 (1980)).

[57] 400 U.S. 470, 485 (1971) (plurality op.).

[58] *Id.* at 479, 484-85.

trial court to honor his election."[59] Thus, when a defendant chooses not to insist on his right to have offenses tried together, that "action deprive[s] him of any right that he might have had against consecutive trials."[60] Together, *Jorn* and *Jeffers* show that the double-jeopardy protection belongs to the defendant and that any rights he may possess can be waived based on his choices.[61]

Jorn and *Jeffers* fully apply to a case involving issue preclusion, which is simply one component of the Double Jeopardy Clause.[62] Although the Double Jeopardy Clause was included in the Bill of Rights and discussed at the First Congress,[63] it was only in 1970 in *Ashe* that this Court interpreted the Clause to incorporate issue preclusion.[64]

In *Ashe*, the prosecution tried to prosecute the defendant seriatim for robbing six participants at a poker game.[65] After the defendant was acquitted at the first trial of robbing one participant, the prosecution sought

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[59] 432 U.S. 137, 152 (1977) (plurality op.).

[60] *Id.* at 154.

[61] *See id.* at 154 n.22 ("The right to have both charges resolved in one proceeding, if it exists, was petitioner's; it was therefore his responsibility to bring the issue to the District Court's attention.").

[62] *See, e.g.*, *Bravo-Fernandez*, 137 S. Ct. at 356.

[63] *See Green*, 355 U.S. at 200-03 (Frankfurter, J., dissenting).

[64] *Bravo-Fernandez*, 137 S. Ct. at 358-59.

[65] 397 U.S. at 437-39.

to prosecute him again for robbing a different participant.[66] This Court found that double jeopardy barred the second prosecution based on issue preclusion. "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[67] In *Ashe*, "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not."[68]

Since *Ashe*, this Court has continued to refine and often narrow the scope of the issue-preclusion protection. In *Standefer v. United States*, the Court declined to extend the Double Jeopardy Clause to incorporate "nonmutual collateral estoppel."[69] In that case, the defendant argued that a jury's acquittal of his accomplice in a different trial should bar his prosecution for aiding and abetting the crime his accomplice was acquitted of committing.[70] Although the Court acknowledged that "symmetry of results may be intellectually satisfying, it is not required"; "criminal case[s] involve[] 'competing policy considerations' that outweigh the economy concerns that undergird the estoppel doctrine."[71]

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[66] *See id.* at 439-40.

[67] *Id.* at 443.

[68] *Id.* at 445.

[69] 447 U.S. at 21-26.

[70] *See id.* at 13-14.

[71] *Id.* at 25.

And in *Ohio v. Johnson*, this Court refused to extend issue-preclusion protection to a defendant who had pleaded guilty to lesser-included offenses over the government's objection and then asserted that double jeopardy barred his prosecution on the remaining charges.[72] In addition to pointing out that "the taking of a guilty plea is not the same as an adjudication on the merits after full trial," the Court unequivocally stated that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable."[73]

After *Johnson*, this Court has decided several cases that address the effect of inconsistent jury verdicts on issue preclusion. In *United States v. Powell*, the Court held that a defendant could not challenge on issue-preclusion grounds a jury's inconsistent verdict acquitting her of predicate offenses but finding her guilty of other crimes where a predicate offense was an element of the crime.[74] Then, in *Yeager*, the Court concluded that issue preclusion can apply when a jury acquits on some counts but is unable to agree on others; according to the Court, hung counts do not change the potentially preclusive effect of the acquittals.[75] And this past term, in *Bravo-Fernandez v. United States*, the Court held that issue preclusion does not prevent

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[72] 467 U.S. at 500 n.9.

[73] *Id.*

[74] 469 U.S. 57, 69 (1984).

[75] 557 U.S. at 112, 124-26.

the government from retrying a defendant after a jury acquits on some counts and an appellate court reverses the conviction on other counts.[76]

B. Although several courts have reached different conclusions about when the issue-preclusion protection is waived, the issue would benefit from further percolation.

The Supreme Court of Virginia's decision in this case fits comfortably within this Court's Double Jeopardy Clause and issue-preclusion precedent. Currier agreed to have his firearm charge tried separately from his breaking-and-entering and grand-larceny charges.[77] That choice benefited him by avoiding the introduction of prejudicial evidence that he was a felon.[78] The federal courts of appeals that have decided the waiver question have all agreed that the defendant's consent waives any issue-preclusion claim he may have had for the reasons given in *Johnson* and *Jeffers*.[79]

In *United States v. Blyden*, the Third Circuit addressed a case where several defendants were acquitted on firearm charges under Virgin Islands law and

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[76] 137 S. Ct. at 357.

[77] Pet. App. 4a; *see also* Jt. App. 598-99.

[78] Jt. App. 480-82.

[79] *United States v. Blyden*, 930 F.2d 323 (3d Cir. 1991); *United States v. Ashley Transfer & Storage Co.*, 858 F.2d 221 (4th Cir. 1988).

argued that double jeopardy barred a second trial on certain federal charges.[80] The court found that the defendants had waived their double-jeopardy argument because they had "successfully opposed a consolidated trial on the Virgin Islands and federal charges."[81] And in *United States v. Ashley Transfer & Storage Co.*, the Fourth Circuit found that a double-jeopardy challenge had been waived where the defendants had filed a motion asking the district court "to require the government to elect between prosecuting count I or count II."[82] The district court decided to submit only count I to the jury, which acquitted the defendants.[83] Applying *Johnson*, the Fourth Circuit permitted the defendants to be retried on count II, holding that "[w]here, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy."[84]

Although Currier claims that the New Jersey Supreme Court held in *State v. Chenique-Puey* that a defendant's consent to severance waives his double-jeopardy right to issue preclusion, that court's discussion of waiver was dicta.[85] In *Chenique-Puey*, the court

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[80] 930 F.2d at 327-28.

[81] *Id.* at 328.

[82] 858 F.2d at 223.

[83] *Id.*

[84] *Id.* at 227.

[85] 678 A.2d 694 (N.J. 1996); *see also* Pet. 9. Currier's petition also notes that "[t]wo state intermediate courts have reached the

addressed whether the defendant was entitled to a new trial due to unfair prejudice that resulted from jointly trying charges of "making terroristic threats to kill" and "contempt of a domestic-violence restraining order."[86] The defendant had "moved for a severance of the contempt charge," but the court denied the motion.[87] After concluding that the defendant was entitled to a new trial on the terroristic-threat charge, the court briefly discussed an issue-preclusion concern the government had raised about severance.[88] The court noted that severance "should not create a double-jeopardy problem," because the defendant "should be precluded" from claiming double jeopardy if he moved for the severance.[89] That speculative discussion about a future case, however, was pure dicta.

In contrast to the Third and Fourth Circuits, Currier argues that "three state courts of last resort and one federal court of appeals" have held that a defendant like Currier does not waive his right to issue-preclusion protection by consenting to severance.[90] But he overstates what those courts actually decided.

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same conclusion" as the Supreme Court of Virginia. Pet. 9-10. But those decisions are not from a "state court of last resort" and therefore do not count in determining whether there is a circuit split. *See* Rule 10(b).

[86] *Chenique-Puey*, 678 A.2d at 695.

[87] *Id.* at 696.

[88] *Id.* at 698.

[89] *Id.*

[90] Pet. 11.

The First Circuit did not address that issue in *United States v. Aguilar-Aranceta*.[91] The court's holding was that the defendant "ha[d] failed to present a viable collateral estoppel argument."[92] The basis for the court's holding was that the defendant had not shown that the relevant "issue was actually and necessarily decided by the jury in favor of the defendant."[93] There is no discussion of waiver or severance in the issue-preclusion section of the opinion,[94] and certainly no holding that issue preclusion cannot be waived by consenting to severance of multiple charges.[95]

The three State courts of last resort cited by Currier—Iowa, Florida, and the District of Columbia—have addressed the issue, but their analyses are flawed for various reasons. First, the D.C. Court of Appeals held in *Joya v. United States* that issue preclusion did not bar the defendant's trial on a contributing-to-the-delinquency-of-a-minor charge that had been severed before his first trial.[96] While the court stated that the defendant had not waived his issue-preclusion rights

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[91] 957 F.2d 18 (1st Cir. 1992), *abrogated in part by Yeager*, 557 U.S. 110 (2009).

[92] *Id.* at 20.

[93] *Id.* at 24-25.

[94] The court did hold that the defendant's consent to a mistrial had waived any double-jeopardy claim related to successive trials. *See id.* at 22.

[95] The Louisiana Supreme Court decision in *State v. Blache*, 480 So. 2d 304 (La. 1985), similarly did not address, much less hold, that issue preclusion cannot be waived by consenting to severance. *Id.* at 306.

[96] 53 A.3d 309, 312 (D.C. 2012).

by having the charge severed before his first trial, that conclusion was not dispositive since the court did not find the second trial barred.[97] Because the waiver issue did not control the outcome in the case, the court could have denied the defendant's issue-preclusion claim without opining on the more difficult waiver question.[98] As a result, a future D.C. Court of Appeals panel may consider that discussion dicta and reach a different conclusion.[99]

Second, the Florida Supreme Court's discussion in *Gragg v. State* of the waiver issue is not well-reasoned. Indeed, the court begins its analysis by dismissing the plurality opinion in *Jeffers* as "merely dicta."[100] The court does alternatively find that *Jeffers* is distinguishable because "Jeffers had not been forced to waive one constitutional right in order to assert another" whereas the defendant's "constitutional right to a fair trial" was implicated in Gragg's case.[101] But to the extent *Gragg*'s statement about the constitutional right to a fair trial was premised on federal constitutional

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[97] *See id.* at 316-23.

[98] *See supra* Part I.

[99] *See, e.g., Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 720 n.9 (D.C. 1995) ("This court has repeatedly held that *dictum* in a prior case is not binding precedent. . . ."); *Lee v. United States*, 668 A.2d 822, 828 (D.C. 1995) (analysis "was not necessary for the disposition of the case, and thus constituted 'dictum' not binding on us"). The same is also true of *Commonwealth v. States*, 938 A.2d 1016 (Pa. 2007), where the court mentions issue preclusion and waiver only in a footnote. *See id.* at 1023 & n.8.

[100] *Gragg v. State*, 429 So. 2d 1204, 1207 (Fla. 1983).

[101] *Id.* at 1207-08.

law, the court was wrong. It is not a *per se* violation of a defendant's right to a fair trial to admit evidence of a prior conviction—not even the amicus supporting Currier's petition makes that claim.[102] Thus, the only way *Gragg* can be correct is if it turned on a State constitutional right to a fair trial.[103] And if Florida is providing more expansive fair-trial protections than required by the federal Constitution, its analysis says little about how the waiver issue should be analyzed as a matter of federal constitutional law.[104]

Finally, the Iowa Supreme Court's decision in *State v. Butler* did reach the opposite conclusion as the Virginia Supreme Court,[105] but the decision is internally inconsistent. *Butler* cites *Jeffers* for the point that "[t]he protection embodied in the Double Jeopardy Clause is personal and may be waived by a defendant's voluntary actions and choices."[106] Indeed, the court

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[102] *See Old Chief v. United States*, 519 U.S. 172, 191-92 (1997) (noting the abuse-of-discretion standard ordinarily applied to deciding whether admission of a prior conviction was unduly prejudicial); *see also* Amicus Br. Part II.A (attempting to conflate the undue-prejudice inquiry with a constitutional violation).

[103] *See Gragg*, 429 So. 2d at 1208 (citing *State v. Vazquez*, 419 So. 2d 1088 (Fla. 1982)).

[104] *See Oregon v. Hass*, 420 U.S. 714, 719 (1975); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (stating the Court has not "limit[ed] the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution").

[105] 505 N.W.2d 806, 810 (Iowa 1993).

[106] *Id.* at 808.

finds that Butler "waived his double jeopardy protection against consecutive trials" based on his motion to sever two charges.[107] But the court refused to extend that waiver "to Butler's collateral estoppel defense" because the defendant "was not attempting to use collateral estoppel as a sword."[108] That conclusion, however, makes little sense when the two criminal counts would have been tried together but for the defendant's severance motion.[109] *Butler* simply fails to recognize that issue preclusion is one component of the double-jeopardy protection, so the same waiver analysis should apply to both claims.

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Although there is a limited split of authority on the question presented, it is neither a pronounced nor a mature split. As Justice Ginsburg has noted, there are "many instances . . . when frontier legal problems are presented" and "diverse opinions from[] state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."[110] "[T]his is exactly the sort of issue that could benefit from further attention" in lower courts.[111] Of the cases Currier references in his petition, most of the

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[107] *Id.*

[108] *Id.* at 810.

[109] *See infra* Part III.

[110] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[111] *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).

courts that have issued holdings on the waiver question have agreed with the decision reached by the Supreme Court of Virginia in this case. Only three courts could fairly be said to disagree, and of those three, one's analysis may well be considered dicta in that jurisdiction, another is arguably more protective of a criminal defendant's rights on State constitutional grounds, and the third is internally inconsistent. Given "the absence of a pronounced conflict," this Court "should not rush to answer a novel question" about the Double Jeopardy Clause.[112]

III. The Supreme Court of Virginia correctly concluded that the Double Jeopardy Clause was not implicated when the firearm charge was severed for Currier's benefit and with his consent.

The fact that the Supreme Court of Virginia reached the right result in this case further weighs against this Court granting review. Issue preclusion is one component of the Double Jeopardy Clause, and this Court's precedent has long held that defendants waive their double-jeopardy rights by taking certain actions.[113] Currier plainly waived his double-jeopardy rights in this case by agreeing to sever the firearm

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[112] *Id.*

[113] *See, e.g.*, *Jeffers*, 432 U.S. at 153-54; *Jorn*, 400 U.S. at 484-85.

charge for his benefit.[114] Nothing in this Court's precedent sanctions a rule that would deprive the Commonwealth of its one fair opportunity to try a defendant for illegally possessing a firearm when the only reason the charge was not resolved at an earlier trial was for the defendant's benefit and with his consent.

What the Third Circuit said in *Blyden* perfectly encapsulates Currier's argument:

> The instant case is a classic example of able lawyers pursuing what Roscoe Pound once called "the sporting theory of justice." In essence it is as if one were flipping a coin yelling, "Heads I win; tails you lose."[115]

Here, if the firearm charge had not been severed, there can be little doubt that Currier would have claimed severe prejudice.

Indeed, the amicus supporting Currier's petition would have this Court believe that it would have been akin to constitutional error not to sever the charges in this case.[116] His amicus is wrong—criminal defendants are frequently presented with difficult choices and those difficult choices do not by themselves violate the Constitution.[117] So the waiver issue in this case boils

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[114] *See* Jt. App. 598-99.

[115] *Blyden*, 930 F.2d at 327-28.

[116] *See* Amicus Br. 4-8 (discussing cases that involved defendants being forced to choose between two constitutional rights).

[117] *McGautha v. California*, 402 U.S. 183, 213 (1971) ("The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to

down to whether Currier's decision to risk a separate trial on the firearm charge to avoid relevant but potentially prejudicial evidence about his status as a felon from being introduced at his breaking-and-entering and grand-larceny trial waived any double-jeopardy claim he may have otherwise had for the second trial.

Properly framed, this case falls squarely within *Jeffers* and *Johnson*. *Johnson*'s conclusion controls: "where the State has made no effort to prosecute the charges seriatim" the issue-preclusion component of the Double Jeopardy Clause is not implicated.[118] Severance occurred here by agreement of the parties, not at the behest of the Commonwealth.[119] But even if the issue-preclusion protection could apply in a case like this one, *Jeffers* makes clear that double-jeopardy protections are subject to waiver.[120] Again, Currier agreed to have the charges severed, for his benefit, and so even if the issue-preclusion component of the Double Jeopardy Clause applied here, he waived its protections.

Johnson illustrates why that is the right result. Like the defendant in *Johnson*, Currier has attempted to "use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the

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which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.") (citation omitted).

[118] 467 U.S. at 500 n.9.

[119] Pet. App. 4a; *see also* Jt. App. 598-99.

[120] 432 U.S. at 153-54.

remaining charges."[121] To the extent Currier is "forced to relitigate an allegation a jury has already rejected," it is by his own choice.[122] Currier contends that issue preclusion can never function as a sword, but that conveniently avoids the fact that it was his desire to have the charges severed for his benefit that deprived the Commonwealth of its ability to try him on all three charges at one trial. *Johnson* firmly establishes that the Commonwealth is entitled to its "one full and fair opportunity to convict those who have violated its laws."[123]

In the end, Currier's attempt to differentiate this case from *Johnson* and *Jeffers*, on the theory that issue preclusion is concerned solely with finality as opposed to prosecutorial overreach, falls flat under this Court's precedent.[124] *Jorn* expressly addressed the "constitutional policy of finality for the defendant's benefit in federal criminal proceedings" in deciding whether a defendant had waived his double-jeopardy rights.[125] And notwithstanding the finality interest, *Jorn* still focused on the defendant's actions; the critical fact for deciding whether the defendant had waived the double-jeopardy protection was whether he had agreed to a mistrial.[126]

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[121] *Johnson*, 467 U.S. at 502.

[122] Pet. 22.

[123] *Johnson*, 467 U.S. at 502.

[124] Pet. 22-23.

[125] 400 U.S. at 479 (plurality op.).

[126] *Id.* at 484-85.

The same analysis applies here. Where a defendant agrees to severance, he waives any double-jeopardy claim he may have had. Nothing in the constitutional interest in the finality of criminal judgments exempts defendants from the consequences that flow from their choices. Thus, there is no basis for treating the issue-preclusion protection differently from the other protections afforded by the Double Jeopardy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

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